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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-687

NORMA FRANCES RAOUL CLARK and
ANN ELIZABETH RAOUL,
Petitioners,

vs.

AMERICAN NATIONAL BANK AND TRUST
COMPANY OF CHATTANOOGA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TENNESSEE

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November 8, 1975

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TENNESSEE

The petitioners, Norma Frances Raoul Clark and Ann Elizabeth Raoul pray that a writ of certiorari issue to review the order and decree of the Supreme Court of the State of Tennessee rendered in these proceedings on July 7, 1975, and the memorandum opinion on petition to rehear and the decree thereon rendered in these proceedings on August 11, 1975.

OPINIONS BELOW

None of the opinions of the Courts below are as yet reported. They are as follows:*

(a) Opinion of the Chancery Court of Hamilton County, Tennessee, filed March 25, 1970 sustaining the defense of laches (pp. 21-26).

(b) Opinion of the Court of Appeals of Tennessee filed December 31, 1970, reversing the Chancellor; finding no laches and remanding the case for decision on the merits (pp. 26-34).

(c) Opinion of the Court of Appeals of Tennessee filed March 16, 1971, overruling Respondent Bank's petition to rehear, but reserving ruling on the Statute of Limitations issue pending further decision by the Chancellor (p. 35).

(d) Opinion of the Chancery Court of Hamilton County, Tennessee, filed March 15, 1973, finding that the Respondent Bank as Petitioners' trustee violated the prudent man rule and the undivided loyalty rule when exchanging Chevalier Corporation stock in trust in 1944 (pp. 36-47).

(e) Final decree of the Chancery Court of Hamilton County, Tennessee, filed December 27, 1973, rendering judgment in favor of Petitioners in the amount of $3,941,799.74 (pp. 47-48).

(f) Opinion of the Court of Appeals of Tennessee filed August 30, 1974, concurring with the Chancel-

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*All page references are to the pages of the appendix *infra* unless preceded by "Tr." in which event reference is to the trial transcript.

lor's finding of imprudence; disagreeing with the Chancellor's finding of a breach of the loyalty rule; and dismissing the case on the ground that the claim was barred by T.C.A. 28-309, the Tennessee six year Statute of Limitations (pp. 48-69).

(g) Order of the Supreme Court of Tennessee, filed July 7, 1975 denying the petition for writ of certiorari and reciting only that "this Court is of the opinion that the Court of Appeals reached the correct conclusion" (p. 74); also the decree on said order filed the same date (p. 75).

(h) Opinion of the Supreme Court of Tennessee filed August 11, 1975, overruling the petition to rehear and rejecting the Federal constitutional grounds asserted in said petition (pp. 76-77); also the decree thereon filed the same date (p. 78).

JURISDICTION

As shown above, both the memorandum opinion on the petition to rehear, and the decree of the Supreme Court of Tennessee thereon, were filed August 11, 1975 (pp. 76-78). This petition for certiorari was filed less than 90 days from the date aforesaid. The jurisdiction of this Court is invoked under 28 USC §1257(3).

QUESTIONS PRESENTED

In its 1970 opinion overruling the Chancellor on the laches issue, the Court of Appeals of Tennessee expressly held (p. 32) that Petitioners had no "actual or chargeable knowledge" of the facts giving rise to their cause of action against the Respondent Bank, by reason of its actions in 1944 as their trustee, until

shortly before they filed suit in 1964. The Defendant Bank did not appeal from this finding and accordingly it is now the law of this case.

The 1974 opinion of the Court of Appeals of Tennessee (pp. 48-69) sustained the Statute of Limitations defense (pp. 68-69) without reversing or altering said previous 1970 fact finding, now final. This 1974 decision, however, was entered immediately prior to the landmark decision on December 9, 1974, of the Supreme Court of Tennessee in *Teeters* v. *Currey*, ... Tenn. ...., 518 S.W. 2d 512, adopting the so-called "discovery doctrine" for the State of Tennessee, and expressly overruling all prior Tennessee precedent to the contrary. Under this doctrine, applied retroactively to pending cases, the applicable statute of Limitations does not begin to run until the wrong giving rise to the claim is or should have been discovered by the claimant. *Teeters* was a medical malpractice case.

In a subsequent ruling in *McCroskey* v. *Bryant Air Conditioning Company*, decided by the Supreme Court of Tennessee on April 7, 1975, ... Tenn. ...., 524 S.W. 2d 487, at 491, that Court held that the discovery doctrine was not to be limited to medical malpractice cases, but instead was one of universal application in Tennessee in cases involving injuries to persons or property arising out of tort, including *negligence*, product liability and misrepresentation, and again overruled all prior cases to the contrary.

The petitioners' cause of action expressly charged *negligence* in the exchange of stock in question as well as breach of trust (pp. 26, 32, 48).

In its memorandum opinion on the petition to rehear in the subject case filed August 11, 1975, the Tennessee Supreme Court stated:

> "We fully considered *Teeters, supra,* and concluded that it had no relevance to the issues in this controversy."

The questions thereby arising are:

1. Whether the refusal to apply the discovery doctrine announced in *Teeters* to the subject case, thereby eliminating the Statute of Limitations defense, violated fundamental rights of Petitioners under the Equal Protection Clause of the Fourteenth Amendment.

2. Whether the Due Process Clause of the Fourteenth Amendment is violated, if a trustee is permitted to assert the Statute of Limitations as a defense to a cause of action, where the trustee had failed to make full disclosue to its beneficiaries of its 1944 action causing the loss here complained of, and the beneficiaries did not know of same, and had no reason to know of same, until 1963, when they learned what had occurred shortly before suit was filed.

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment XIV, §1:

> ". . . nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF FACTS

Petitioners were beneficiaries of express trusts designated No. 927 and No. 929, administered by the Respondent Bank. In 1944 the Bank, as their trustee, exchanged 323 shares of no par value common stock of

Cavalier Corporation which it held in said trusts, for 323 shares of newly authorized $100.00 par value common stock in said corporation (pp. 21, 28-29, 36-38, 49, 53-54).

The Chancellor found that the effect of making the exchange was to deny a total immediate benefit to the trusts of $341,775.99 if the exchange had not been made, and that in making the exchange the Bank gave up then and there $198.05 per share of each share's pre-exchange book net worth, and a much higher share of actual net worth (p. 40). No higher Court has disagreed with these findings of the Chancellor.

The Chancellor (pp. 42-43) and the Tennessee Court of Appeals (p. 58) concurred as to the Bank's resulting imprudence. Thus, it is the law of this case, by reason of the concurrence of these two lower Courts on this question of fact, that the Bank was imprudent and is accordingly liable but for the Statute of Limitations defense.

The exchange was the result of a plan conceived by Gaston Raoul, for many years head of Cavalier, its chief stockholder and a director, to further his personal estate planning and to shift equity to his son and others with minimal gift and estate tax consequences. Gaston Raoul personally sought to persuade the other no par shareholders to exchange (pp. 38-40, 44-45, 53-54).

Gaston Raoul was also a director of the Bank, whose president and fellow director was E. Y. Chapin. Chapin was a close personal friend of Gaston Raoul; was also a director of Cavalier; had previously been Cavalier's Chairman of the Board, and held a small amount (15 shares) of stock in Cavalier. Cavalier was

an important account for the Bank, which also acted as Cavalier's stock transfer agent (pp. 38, 54).

E. Y. Chapin headed the Bank's trust investment committee but personally handled the exchange of stock in trust (Tr. 706-710, 714-715, 722; Exs. 71 and 72) without consulting said committee (Tr. 871-875). Although Cavalier's 1944 reorganization plan provided a two months' period within which to exchange, Chapin's personal shares and those in the trusts were the first to be exchanged at the very outset of the available period (p. 40; Tr. 715; Ex. 23). It was then known, however, that due to the persuasion of Gaston Raoul, who set the apparent example of exchanging his own shares also, that most of the no par shareholders also planned to exchange (pp. 39-40, 54; Exs. 42 and 119; Tr. 175, 193). Gaston Raoul had discussed and conferred with E. Y. Chapin about the proposed plan of exchange (p. 54).

During the trial petitioners accidentally discovered in files brought to the trial by Bank Director William Raoul, that his father, Gaston Raoul, had written a memo after the exchange about its circumstances (Tr. 650-660, 665-670). This memo (pp. 44, 60-61) stated that E. Y. Chapin had "disapproved of the idea in toto, as being a give-away by the then principal owners to the no par stockholders who might elect not to exchange. . . . He went along with the plan, however, like the loyal friend he always was."

Despite exhaustive discovery procedures this memo was never revealed to Petitioners previously by Respondent Bank.

In his second opinion in 1973 the Chancellor expressly found (p. 45):

> "Nowhere does the record indicate that the Trustee Bank ever disclosed to anyone acting on behalf of the plaintiffs the effects that the exchange of stock hereinabove outlined would have on these trusts."

Not only does the record fully support these findings but no higher Court has disagreed.

Trusts 927 and 929 terminated in 1956 when Petitioners' father, Norman Raoul, died (pp. 53, 56-57). Prior thereto in 1949 and 1950, Petitioners had agreed with their Uncle Gaston Raoul, to the establishment of Trust 1661 for their benefit with the Bank as trustee (Ex. 4). It was agreed that certain assets would be immediately placed in Trust 1661 for them by Gaston Raoul in consideration of Petitioners' agreeing that instead of taking the assets of Trusts 927 and 929 free from trust upon their then living father's death, in accordance with the terms of those trusts, said assets instead would upon such death be transferred to already existing Trust 1661 and there continue in trust for Petitioners' lifetimes (pp. 27-28, 52). A written assignment to the Bank to accomplish this was signed by Petitioners in 1950 (Ex. 152). The Bank continues as trustee of Trust 1661 for Petitioners to this day, the assets of which trust were increased in 1956 upon their father's death pursuant to the foregoing agreement.

The Bank's theory at the trial was that Trust 1661 was merely an extension and consolidation of Trusts 927 and 929 (Tr. 57, 744-747, 809, 843-844; Ex. 146). Nonetheless, the Tennessee Court of Appeals concluded that Tennessee's six year statute (T.C.A. 28-309) was set in motion when Trusts 927 and 929 technically ended in 1956 (pp. 56-57) and thus had run

by the time Petitioners first learned in 1963 what had occurred in 1944 (Tr. 36-45, 233-235, 764, 776-778). In so ruling, the Tennessee Court of Appeals relied upon *Third National Bank* v. *Nashville Trust Co.* (1950), 191 Tenn. 123, 232 S.W. 2d 7 (see pp. 55-56 *infra*). This decision in no way afforded comfort to a trustee which failed to make a full disclosure, and in any event is now subject to the new Tennessee discovery doctrine requiring actual or constructive incovery of the wrong before the statute can begin to run.

The Tennessee Court of Appeals, after noting the Chancellor's viewpoint (pp. 59-62), somehow disagreed and felt that the Raoul memo could be explained on a basis consistent with the Bank's duty of undivided loyalty to Petitiners (pp. 62-64). No one can explain why, if the Bank recognized through Chapin that a "give-away" by "principal owners" was involved when exchanging, there could be any difference with smaller shareholders. Actually, the Bank as trustee, with 323 shares, was a principal shareholder. Only five out of the thirty shareholders who exchanged held more shares, and none who did not exchange held more shares (Exs. 20 and 23). Further, no one can explain why, if the Bank, unlike most of the misguided exchanging shareholders, was sophisticated enough to know that a give-away was involved by the principal shareholders, it was not a breach of trust to fail to accept the recognized corresponding benefits ($341,775.99—p. 40) for Petitioners by refusing to exchange.

A classic case is presented where the Bank had a duty to fully disclose what it did know, and give the beneficiaries an opportunity to protest, instead of proceeding unilaterally without Court approval.

To reach the result which it did, the Tennessee Court of Appeals also ignored the rigid principles of trust law fully set forth in the leading case of *Cowan* v. *Hamilton National Bank*, 177 Tenn. 94, 146 S.W.2d 359 (1941), forbidding a trustee to act at all unless it is wholly disinterested and without any possible adverse personal interest which might be served thereby. Under *Cowan*, when the Bank nonetheless acted with its many conflicts of interest involved, a breach of trust occurred per se, and the rule of "no further inquiry" applied regardless of what a Court might think otherwise of the propriety of the action.

How Federal Question Was Raised

When the Supreme Court of Tennessee on July 7, 1975, denied Petitioners' petition for a writ of certiorari to the Court of Appeals of Tennessee (pp. 74-75), a petition to rehear was filed. This petition asserted a violation of Petitioners' rights under the Due Process and Equal Protection clauses of the Fourteenth Amendment, by reason of the failure to apply the discovery doctrine first announced in *Teeters* (p. 76). In its memo opinion denying said petition to rehear, the Tennessee Supreme Court did not specifically pass on the issue, merely holding *Teeters* "had no relevance" (p. 77). This was the first and only occasion Petitioners had to raise this federal issue previously in this protracted litigation.

Inherent in this issue is the second issue of whether as a matter of due process of law the statute can begin to run to protect a trustee who failed to disclose, until the beneficiaries discovered the wrong. Petitioners have contended before all three lower courts that it cannot, most recently as an assignment of error by the Tennessee Court of Appeals in the Petition for Certiorari to the Tennessee Supreme Court.

REASONS FOR GRANTING THE WRIT

1. The Equal Protection Clause requires that Petioners be given the benefit of the discovery doctrine announced in the *Teeters* case.

The equal protection clause requires uniformity in dealing with parties in similar circumstances. *Stewart Dry Goods Co.* v. *Lewis*, 294 U.S. 550, 79 L. Ed. 1045, 55 S. Ct. 525 (1935). Distinctions can be made between parties but the classification must be based on reason. *Truax* v. *Corrigan*, 257 U.S. 312, 66 L. Ed. 254, 42 S. Ct. 124 (1921). The guarantee of equal protection applies to judicial action as well as legislative and executive action. *Binkerhoff-Farris Trust & Savings Co.* v. *Hill*, 281 U.S. 673, 74 L. Ed. 1107, 50 S. Ct. 451 (1930).

It is recognized, however, that the equal protection clause does not assure uniformity of judicial decisions or immunity from judicial error. *Beck* v. *Washington*, 369 U.S. 541, 8 L. Ed. 2d 98, 82 S. Ct. 955 (1962). Thus, one who has lost a judicial decision but can show a later decision between strangers irreconcilable on a matter of law with the earlier decision has had no federal right violated. *Milwaukee Electric Railway & Light Co.* v. *Wisconsin Ex Rel. Milwaukee*, 252 U.S. 100, 64 L. Ed. 476, 4 S. Ct. 306 (1920). This simply means that a State Court is free to change its mind. In the subject case, however, the Tennessee Supreme Court has not sought to overrule its recently announced *Teeters* decision, further expounded upon in *McCroskey*, but instead, without explanation, asserted in the subject case (p. 77) that *Teeters* "had no relevance to the issues in this controversy."

In *Teeters* the Tennessee Supreme Court stated (518 S.W. 2d 512 at 514-516):

"When does the cause of action accrue?

"In Bodne v. Austin, 156 Tenn. 366, 2 S.W. 2d 104 (1927) the Court said:

'. . . we have been referred to no authority holding that mere ignorance and failure to discover the existence of the cause of action, or the consequential damages resulting from the breach of duty or wrongful act, can prevent the running of the statute of limitations.'

"But this was in 1927 almost half a century ago."

* * *

"The time has come for us to re-examine the past holdings of our Appellate Courts in the light of contemporary standards of justice and of the holdings of the courts of last resort in other American jurisdictions."

* * *

"We find it difficult to embrace a rule of law requiring that a plaintiff file suit prior to knowledge of his injury or, phrasing it another way, requiring that he sue to vindicate a non-existent wrong, at a time when injury is unknown and unknowable."

* * *

"We recognize that statutes of limitations are statutes of repose designed to promote stability in the affairs of men and to avoid the uncertainties and burdens inherent in defending stale claims."

"In recognition of this, traditionally our courts have held that a right of action accrues immediately upon the infliction or occurrence of injury

and that mere ignorance or failure of plaintiff to discover his cause of action or the subsequent resulting damage does not toll the statute. Bodne v. Austin, supra."

"That this is a harsh and an oppressive rule there can be little doubt. To counter the casualties it has produced the courts have fashioned the so-called 'discovery doctrine', under which the statute does not begin to run until the negligent injury is, or should have been discovered."

The Court quoted with approval at 518 S.W. 2d 516 from *Layton* v. *Allen*, 246 A. 2d 794 (Del. 1968) as follows:

"Where choice must be made between the defendants' problems of lost evidence, faded memories, and missing witnesses on the one hand, and a deprivation to the plaintiff of any and all remedy for the wrong done her, on the other, the law must be construed in favor of the blamelessly ignorant plaintiff and against the interests and convenience of the wrong-doer."

In *McCroskey* the Tennessee Supreme Court stated (524 S.W. 2d 487 at 491 and 493):

"We hold that in tort actions, including but not restricted to products liability actions ("conceived in an illicit intercourse of tort and contract")[5] predicated on negligence, strict liability or misrepresentation,[6] the cause of action accrues and the

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[5] Prosser, The Fall of the Citadel, 50 Minn. L. Rev. 791, 800 (1965).

[6] Misrepresentation is a tort. See Restatement (Second) of Torts, Sec. 402B (1965).

> statute of limitations commences to run when the injury occurs or is discovered, or when in the exercise of reasonable care and diligence, it should have been discovered. All cases contra are overruled."
>
> * * *
>
> "Petitioner insists that the Court has 'legislated' in reaching its decision in defining or redefining the accrual date of the cause of action. We cannot assume that the Legislature would adopt a statute which would deny redress to a citizen by requiring that he sue prior to knowledge of his injury. We therefore, adopted a discovery rule in order to validate the statute and prevent a plain deprivation of justice."

Petitioners' cause of action was based upon both *negligence* in making the exchange and breach of trust (pp. 26, 32, 48). If nonetheless the unexplained rationale of the refusal to apply *Teeters* to the present case is that the cause of action was not to be classified as sounding in tort, and that the discovery doctrine is to be limited to injured tort claimants, despite the blurred line between tort and contract in the included product liability cases, then it is respectfully submitted that a distinction or classification is being made, that is wholly arbitrary and capricious, and without a material difference between wronged citizen-claimants. A plain violation of the Equal Protection Clause accordingly results. The test for application of the discovery doctrine is obviously when the injury or wrong was first known or should have been known, and not the nature of the cause of action selected thereafter to achieve a remedy.

Further, as quoted above, "misrepresentation is a tort." Likewise, a failure of a trustee as here to observe the full disclosure duty is a *fraudulent* concealment constituting a tort equivalent to misrepresentation. Opinion of the Court of Appeals of Tennessee (pp. 58-59); *Hutsell* v. *Citizens National Bank,* 166 Tenn. 598, 64 S.W. 2d 188 at 192; 90 C.J.S. "Trusts" §247 (2). To perpetrate a *fraud* is to commit a tort. 37 Am.Jur. 2d "Fraud and Deceit" §332.

A recent decision of the Supreme Court of West Virginia, *Family Savings and Loan, Inc.* v. *Ciccarello,* 207 S.E. 2d 157 (1974), applied the discovery doctrine to a situation where an attorney had committed an act of professional negligence. The Court held that the statute of limitations began to run when the wrongdoing was discovered or, by the exercise of reasonable diligence, should have been discovered. There would appear to be little distinction between such acts of negligence, whether committed by an attorney or a trustee.

Petitioners assert that there can be no rational basis for granting some claimants in Tennessee the benefits of the discovery doctrine while denying Petitioners the equivalent benefit. The error is gross and obvious, as well as arbitrary and capricious, justifying intervention by this Court. *Roberts* v. *New York,* 295 U.S. 264, 79 L. Ed. 1429, 55 S. Ct. 689 (1935); *Beck* v. *Washington,* supra. This Court has announced that it will correct violations of equal protection rights if the burden of showing essential unfairness can be met by those who claim the injustice. *Beck* v. *Washington,* supra. Petitioners respectfully submit that they have met that burden.

Under the Equal Protection Clause, the Tennessee Supreme Court is not privileged to grant some citizens the benefit of a rule of state law, and without revoking the rule, to selectively deny the same benefit to others in identical material circumstances. A Court may not permit a desired result to control the applicability of a rule of law; instead the rule must control the result.

2. Under the Due Process Clause a claim against a trustee may not be barred by the Statute of Limitations where the trustee had failed to make full disclosure and the beneficiary-claimants had no actual knowledge or reason to know until immediately before suit was filed.

The due process clause requires that the action of the state through any of its agencies must be consistent with fundamental principles of liberty and justice. *Buchalter* v. *New York*, 319 U.S. 427, 87 L. Ed. 1492, 63 S. Ct. 1129 (1943). Basically, the due process clause requires that even in a civil case every man shall have the protection of his day in Court or at least have the opportunity for his day in Court. *Truax* v. *Corrigan*, supra. This Court has repeatedly held that a statute of limitations that is unduly short under the circumstances, after the accrual of a cause of action, violates this right. *Wilson* v. *Iseminger*, 185 U.S. 55, 46 L. Ed. 804, 22 S. Ct. 573 (1902); *Mills* v. *Scott*, 99 U.S. 25, 25 L. Ed. 294 (1878).

So far as Petitioners have been able to discover, the issue here presented, however, has not been previously considered by this Court.

The unappealed from and hence conclusive 1970 finding that there was no basis for laches as a defense, by reason of Petitioners' lack of knowledge or reason

to suspect (p. 32), in and of itself should be conclusive that the Bank-trustee failed in its fundamental duty, to make full disclosure in 1944 or thereafter to its beneficiaries. The issue is thus a basic one of

(a) Whether trustees are to be encouraged to remain silent and violate their universally recognized duty to disclose, with the hope that in due course the statute will run against their unsuspecting beneficiaries, and bar otherwise resulting claims; or

(b) Whether fiduciaries who have failed to make full disclosure shall know with certainty that the statute will not protect them unless they can show that the beneficiaries otherwise knew or should have known.

The Court of Appeals of Tennessee held that fraudulent concealment tolling the application of the statute had not occurred, *solely* on the ground that the Bank had sought and obtained Petitioners' father's consent to the exchange. Based on this fact alone it concluded that "the exchange in 1944 was in no manner hidden from *anyone*" and that "There was no physical concealment from *anyone* of the transaction itself" (p. 59). The Tennessee Supreme Court has concurred only in the "*conclusion*" of the Court of Appeals that the statute barred the claim, and nothing more (p. 74).

The Bank did not seek Court approval of the exchange. There was no contention that any disclosure of any sort was made to Petitioners themselves at any time. There was no proof as to what if anything the Bank disclosed to Petitioners' father, Norman Raoul, prior to obtaining his brief written consent (Ex. 140). Significantly, Chapin, who knew all, had Bank Trust Officer Martin, who was admittedly uninformed, contact Norman Raoul, a World War II Post Exchange

Manager, to obtain said consent (Tr. 714-715, 722-729, 737). Norman Raoul was not authorized to act for Petitioners by any Court. His consent, whether informed or uninformed, was meaningless. 76 Am.Jur. 2d "Trusts" §335 and §336.

The burden was on the Bank to prove that it had made a full disclosure. *Knox County* v. *Fourth and First National Bank*, 181 Tenn. 569, 182 S.W. 2d 980 at 986. This disclosure obviously had to be to the right parties. Consent obtained without it is no defense. 76 Am.Jur. 2d "Trusts" §336. The Raoul memo (p. 44) demonstrates that the Bank fully understood through Chapin the consequences of the exchange, namely that a "giveaway" was involved, but there is not one shred of evidence that this knowledge was communicated to the beneficiaries or anyone authorized to act on their behalf (p. 45). This was a plain violation of the duty to disclose, which the father's consent cannot possibly excuse.

It is accordingly submitted that a shocking miscarriage of justice will have occurred, contrary to basic and universal principles of American jurisprudence, if the Statute of Limitations is allowed to shield the Bank, despite breach of its duty to fully disclose. This breach of duty resulted in lack of knowledge on the part of Petitioners until after the statute had run. A clear violation of basic rights of Petitioners under the Due Process Clause is accordingly involved, in the Tennessee Supreme Court's approving this departure from the accepted and usual course of judicial proceedings, by sustaining the statute of limitations defense.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Tennessee Supreme Court has decided a federal question of substance not heretofore determined by this Court, and in a way not in accord with the applicable decisions of this Court. A writ of certiorari should accordingly issue to review the action of the Supreme Court of the State of Tennessee, embodied in its decrees upholding the statute of limitations as a bar to Petitioners' claims.

Respectfully submitted,

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APPENDIX

No. 38441
IN THE CHANCERY COURT, PART 1, OF
HAMILTON COUNTY, TENNESSEE

NORMA FRANCES RAOUL CLARK, *et al.*,
Plaintiffs,

vs.

AMERICAN NATIONAL BANK and TRUST
COMPANY OF CHATTANOOGA,
Defendant.

CHANCELLOR'S MEMORANDUM OPINION
(Filed March 25, 1970)

This suit was brought in 1964 by plaintiffs, Norma Frances Raoul Clark and Anne Raoul, as the beneficiaries of express trusts against American National Bank and Trust Company of Chattanooga ("Bank"), trustee of the trusts, and charges the Bank with negligent breaches of trust (a) in exchanging, in 1944, 323 shares of no-par common stock of Cavalier Corporation, Chattanooga, Tennessee ("Cavalier"), for an equal number of shares of that company's $100.00 par value "common" stock and (b) in failing to file suit against Cavalier, its directors and others in 1963 to prevent Cavalier from calling for redemption the said 323 shares of par stock at $100.00 per share and accrued dividends. The complaint contains a third charge of breach of trust—that the Bank was negligent in voting for a 1954 amendment to Cavalier's charter, which, so the plaintiffs allege, took away liquidation rights from the par stockholders but at the trial it was stipulated that the 1954 amendment changed no rights of the holders of par stock (Tr. 804-05), hence this third charge must now be considered as having been abandoned. What-

ever the liquidation rights of the par stock before the 1954 amendment, they were not changed by that amendment.

Cavalier had a right to redeem the par stock at $100.00 per share under provisions of its charter, the provisions being also printed on the face of the par value stock certificates.

(Here follows discussion of issue of whether or not Cavalier's par common stock shared beyond its preference on liquidation, no longer material.)

The Court concludes that the $100 par value common stock was not entitled to share with the no-par common stock in any surplus upon liquidation of the Cavalier Corp. beyond the $100.00 par value plus accumulated dividends.

Accordingly, the Court holds that plaintiffs were in no wise injured by having their $100.00 par stock called for redemption prior to the sellout of Cavalier to Seeburg. Therefore, the defendant Bank, as Trustee for plaintiffs, did not fail in any duty toward plaintiffs when it accepted the redemption of plaintiffs' stock without protest in 1963.

The other prong of this suit is the claim of the plaintiffs that the defendant Trustee committed a breach of trust in 1944 when it exchanged the no-par common stock which it then held in the assets of plaintiffs' trust accounts for the new issue $100.00 par value common stock of the Cavalier Corp. The insistence is that the Bank was disqualified to act as Trustee in this instance because two of its directors, Mr. E. Y. Chapin, Sr., who also was the senior trust officer of the Bank, and Mr. Gaston Raoul, who was chairman of the board of Cavalier Corp., were also directors of the Cavalier

Corp. Plaintiffs contend that this situation of having directors of the Bank who were also directors of the Cavalier Corp. placed the Bank, as Trustee, in the position of having a conflict of interest so that in exchanging the stock in question the Bank was engaging in "self-dealing" which would authorize the beneficiaries of the trust to disaffirm the exchange. In the alternative, the plaintiffs insist that the Bank failed to exercise reasonable prudence and due caution in exchanging the no-par value stock for the new $100.00 par value common stock since, in the opinion of the plaintiffs, the $100.00 par value stock was not as suitable an asset of the trust as was the no-par value common stock which was exchanged.

The defendant Bank, Trustee, asserts several defenses to these claims on the merits and also pleads the defense of laches. The plaintiffs' reply to the defendant's claim of laches is that the plaintiffs were not aware of their cause of action until Cavalier sold its assets to Seeburg in 1963 and that they should not be repelled for failing to bring an action when they had no knowledge of its existence. But is this insistence of plaintiffs' valid?

> "A *cestui que trust* cannot sit idly by and close his eyes to what is going on around him. One who would repel the imputation of laches on the score of ignorance of his rights must be without fault in remaining so long in ignorance of those rights. Indolent ignorance and indifference will no more avail than will voluntary ignorance of one's rights. As a Pennsylvania court has said: 'Laches is not excused by simply saying: 'I did not know.' If by diligence a fact can be ascertained, the want of knowledge so caused is no excuse for a stale claim.

The test is not what the plaintiff knows but what he might have known by the use of the means of information within his reach, which vigilance the law requires of him'."

". . . The courts are suspicious of claims founded on remote transactions where in the interval the property has greatly increased in value, and the plaintiff made no claim until this change has occurred." *Bogert, Trusts & Trustees,* Section 949, Laches.

"Laches in suing to set aside transfers of property to corporate officers often depends upon whether the stockholder who sues is chargeable with knowledge of the transfer. As to this matter, it is generally held in this country that means of knowledge plainly within the reach of stockholders by the exercise of the slightest diligence is, in legal effect, the equivalent of knowledge." 3 *Fletcher, Cyclopedia of Corporations,* Section 987.

"The view followed by most of the authorities on the point is that, if the other elements of laches are present in the case, the complainant may be charged with laches if, but only if, he was either actually or presumptively aware of his rights. Under such view, knowledge of the conduct giving rise to the complainant's cause of action may be imputed to the complainant by reason of an opportunity to acquire knowledge or because of circumstances of which he was cognizant, such as obvious and unconcealed activities affecting the property in dispute. He will be charged with knowledge where the evidence leads to the conclusion that he could have informed him-

self of the facts by the degree of 'diligence' which the law exacts—described as 'reasonable' diligence—or where circumstances of which he was cognizant were such as to put a man of 'ordinary' prudence on inquiry. Knowledge may be imputed to the complainant by reason of the fact that the circumstances of the transaction were publicly and generally known at the place of his residence." 27 *Am.Jur.2d,* Equity, Section 167.

The Court concludes in this case that the plaintiffs knew or should, in exercise of reasonable diligence, have known of all the facts constituting their alleged cause of action for breach of trust by the defendant Bank in exchanging their stock, at least since 1950 when the younger one became 21 years of age. The exchange of stock was made openly and the circumstance that Mr. Chapin and Mr. Raoul were common directors of the Bank and Cavalier Corp. was known or could easily have been ascertained by the plaintiffs; and, in fact, everything which the plaintiffs have asserted in this action could have been as easily ascertained 14 years ago as now. There is no evidence that the trustee bank refused to give any information to the plaintiffs; indeed, the plaintiffs sought none until 1963. The Court is of the opinion that the tremendous increase in the value of the no-par stock from the time of the exchange to the time suit was brought is a factor which calls for the application of laches and shows great prejudice to the defendant as does the fact that the principal witnesses and parties involved, such as Mr. Chapin and Mr. Gaston Raoul, have long since died and are unavailable as witnesses 27 *Am.Jur.2d,* Equity, Section 171; *Bernard* v *Walker,* 186 Tenn. 617, 212 S.W.2d 600; *Gibson's Suits in Chancery,* 5th Edition, Section 81; 54 *Am.Jur.*, Trusts, Section 579; *Restatement of Law of Trusts,* Sec-

tion 219; *Cullen* v *Coal Creek Mining & Mfg. Co.*, (Tenn.Chanc.App.) 42 S.W. 693; *Uffelman* v *Boillin*, 19 Tenn.App. 1, 82 S.W.2d 545; *Kissler & Co.* v *Ensley Co.*, 141 Fed. 130.

The Court concludes that the defense of laches should be sustained and accordingly the Court does not reach the question whether or not the Bank as Trustee actually committed a breach of trust.

Accordingly, the complaint will be dismissed.

March 25, 1970.

/s/ Ray L. Brock, Jr.
Chancellor—Part 1

IN THE COURT OF APPEALS OF TENNESSEE
WESTERN SECTION SITTING
AT KNOXVILLE

Hamilton Equity #193

NORMA FRANCES RAOUL CLARK, et al.,
Appellants,

vs.

THE AMERICAN NATIONAL BANK
& TRUST COMPANY,
Appellee.

OPINION

(Filed December 31, 1970)

Beneficiaries of express trusts brought suit in the Chancery Court of Hamilton County, Tennessee, against American National Bank and Trust Co. of Chattanooga, Trustee of the trusts, charging negligence in the exchange of certain stocks, in failing to prevent the re-

demption of the exchanged stock by appropriate Court action, and breach of trust. The Decree was in favor of the trustee and the beneficiaries have appealed.

The stock in question is 423 shares of Cavalier Corporation, designated as "$100 par-value common stock".

The trust in question was composed of these 423 shares at the time call was made by the corporation. The Trustee acquired the Cavalier stock in the manner following:

(a) In 1932, Gaston C. Raoul, president of Cavalier and uncle of the complainants, gave in trust 124 shares (Cavalier then being known as Tennessee Furniture Company) of no-par value stock, for the benefit of complainants and their father, Norman Raoul.

Subsequently, Gaston C. Raoul purchased from his brother, Norman Raoul, the interest of his brother, Norman Raoul, in their father's (W. G. Raoul) estate, and donated the entire interest including 160 shares of Cavalier no-par value to this trust.

(b) Complainants' grandmother, Mary M. Raoul, by testamentary trust for the benefit of complainants and their parents, gave 39 shares of Cavalier no-par value.

(c) In 1950, prior to Norman Raoul's death, Gaston C. Raoul felt that the trust should continue on for complainants' lifetime, rather than terminate on Norman's death or when complainant, Norma Raoul (Clark) became 25 years of age, as the trust then provided. Therefore, Gaston C. Raoul offered to deposit 50 shares of $100 par-value common stock in the trust if Ann Raoul, who was over 21, would so agree, and an additional 50 shares of $100 par-value common stock when Norma Raoul (Clark) became 21 years of age and conditioned

upon her ratification in writing. Both Ann and Norma agreed, with Norma confirming the new trust arrangements subsequent to becoming of age.

Of the total 423 shares in the trust, 384 shares were gifts from Gaston C. Raoul, and 39 were received under the Will of Mary M. Raoul.

The general purpose of the trusts created was to provide for the maintenance and education of Norma and Ann Raoul and the maintenance of their father, Norman Raoul, if needed. However, the dominant purpose was to provide for Norma and Ann Raoul.

In 1944, the Trustee exchanged the 323 shares of no-par value common stock of Cavalier it then held for a like number of redeemable "$100 par-value common stock" of Cavalier. In 1963 the corporation called in and redeemed at par all "$100 par-value common stock" then outstanding. The Trustee in 1963 held 423 such shares, having acquired by donation from Gaston C. Raoul subsequent to 1944 an additional 100 shares of "$100 par-value common stock" when life of the trust was extended for the lifetime of Norma and Ann Raoul. The Trustee received, at the time of the call, $100.00 per share it held plus any accrued interest or dividend. Approximately four months after the call of the shares, Cavalier was sold to Seeburg Corporation and Cavalier was liquidated with substantially in excess of $100.00 per share paid to those holding no-par common stock.

A thrust of this suit is directed towards the voluntary exchange by the Trustee in 1944 of the 323 shares of no-par common it then held, for a like number of redeemable "$100 par-value common stock". The complainants contend that the Trustee was negligent in permitting the exchange, exercised bad faith, and

breached its trust. Because of this exchange, complainants were denied the right to participate in the surplus on liquidation of the corporation. Seemingly almost incongruous to us, complainants also contend that the "$100 par-value common stock" had the right to participate with other common shareholders on liquidation. We say incongruous because if the "$100 par-value" shareholders had participation rights on liquidation, the Trustee certainly committed no wrong in exchanging common stock with no preferred income and no par value for stock with preferred income, par value, and the right to participate on liquidation.

The complainants also have maintained that the Trustee breached its trust in 1963 when it permitted the redemption of the "$100 par-value common stock" without protest and without seeking relief from the Courts to prevent such redemption; or, upon learning of liquidation, failure to take appropriate steps to prevent the distribution of funds to no-par value shareholders.

Of course, this position depends upon whether or not the par value shareholders are entitled to share with no-par value shareholders on liquidation.

The learned Chancellor concluded that the "$100 par-value common stock" was not entitled to share with the no-par common stock in any surplus upon liquidation of the Cavalier Corporation beyond its $100 par value plus accumulated dividends. Therefore, the Chancellor held that since the par value stock was redeemed at its maximum possible value and could not share in any surplus, it became immaterial as to whether or not the Trustee was negligent in 1963 in permitting the stock it held to be redeemed.

As to the question of the propriety of the 1944 exchange of stock by the Trustee, the learned Chancellor

concluded that the complainants were guilty of laches in waiting 14 years before bringing suit from the date the youngest complainant beneficiary reached her majority, and the complaint regarding the 1944 transaction was barred. Therefore, the Chancellor never reached the issue of whether or not the Bank, as Trustee, actually committed a breach of trust in regard to the 1944 transaction. There is no finding of fact in that regard in this record.

The Errors assigned are the foregoing conclusions of the Chancellor.

We are of the opinion that the Chancellor was correct in his conclusion that the par value shareholders were not entitled to share with no-par value shareholders in the surplus upon liquidation beyond $100 par value plus accumulated dividends.

(Here follows discussion of issue of whether or not Cavalier's par common stock shared beyond its preference on liquidation, no longer material.)

Therefore, the Chancellor was correct in holding that par-value holders would not be entitled to share with no-par holders in surplus after liquidation, thereby pretermitting all questions of the Trustee's negligence or breach of trust subsequent to the 1944 exchange. The first Assignment of Error is therefore overruled.

The question now remaining is whether or not the Chancellor was correct in applying the doctrine of laches to the 1944 transaction by the Trustee involving the exchange of no-par for par-value stock. The record indicates that complainant, Norma Raoul Clark, was a minor at the time of the 1944 transaction, not attaining her majority until August 15, 1950. Complainant,

Ann Raoul, was born June 2, 1921, and therefore was over 21 years of age in 1944. However, the income from the trust existent in 1944 and periodic statements pertinent thereto were received by Norman Raoul, the father of the complainants. Both complainants testified they were unaware of the trust terms until 1950 when Gaston C. Raoul made the donation heretofore mentioned of an additional 100 shares. Complainants did not directly receive the income from the trust existent in 1944 until after the death of their father in 1956, at which time statements and income were received by them. Also, the record reveals that complainant, Ann Raoul, was committed to Eastern State Hospital in 1960, but subsequently restored. Therefore, at the time of the alleged wrongful transaction, one of the beneficiaries was a minor and neither of the beneficiaries knew of the existence or nature of the trust, as all matters pertaining thereto were handled by their father and all income and statements from the Trustee were received by him. The Chancellor was of the opinion that complainants were barred by laches as "everything which the plaintiffs have asserted in this action could have been as easily ascertained 14 years ago [1956] as now." Evidently, the learned Chancellor was of the opinion that, upon the death of complainants' father in 1956, and by this fact the creation of a more direct relationship between beneficiaries and Trustee, the beneficiaries knew or should have known, or could have learned by the exercise of reasonable diligence of the circumstances surrounding the 1944 transaction. We must respectfully disagree with the learned Chancellor on the question of the applicability of the doctrine of laches. The beneficiaries, from 1956 to the redemption of the stock issued, regularly received dividends and statements. On the statements

opposite the number of shares was the notation "$100 par common". There was no change in the notation from 1956 to redemption. The beneficiaries would have no reason to know or suspect any change had been made in the nature of the stock in 1944. Why should or how could the beneficiaries inquire of the Trustee concerning the 1944 transaction when they knew not of its existence? The beneficiaries were not title holders of the shares in question. Title was held by the Trustee. We do not think it reasonable to require beneficiaries of stock held by a Trustee, when beneficiaries become aware of the trust, to demand of the corporation access to corporate minutes, etc., or be barred by laches, when the beneficiaries would have no idea when or if an alleged breach took place. Nor do we think it incumbent upon the beneficiaries to demand of the Trustee explanation of an event of which the beneficiaries had no knowledge. We are unable to find any circumstance subsequent to 1956 which would put a person of ordinary prudence on inquiry concerning the complained of stock exchange in 1944. In order for the doctrine of laches to apply, there must not only be a long delay, but the sleeping on of one's rights. To "sleep on" one's rights entails an acquiescence in the fact complained of. To acquiesce in a fact, there must be actual or chargeable knowledge of a fact. The real test as to chargeable knowledge is "what he might have known, by the use of the means of information within his reach, with the vigilance the law requires of him". Bogert, *Trusts & Trustees*, 2nd Edition, page 455. We hold that there was no such knowledge present in this case and appellants' second Assignment of Error is sustained.

We hold that, whether or not there was negligence or breach of trust on the part of the trustee in 1944

is a question of fact that should have been determined by the Chancellor. This remaining issue of fact is determinative of the case and the matter is before us without a finding of fact by the Chancellor on that determinative factual issue. Ordinarily, we would proceed to make such a decree as we think should have been made under the proof whenever there is an incomplete finding of fact by the Chancellor. However, the finding of fact by the Chancellor which we lack in this case, addresses itself to the very heart of the matter. When such is the case and justice requires, we have the authority to remand the cause for further findings of fact. T.C.A. 27-329; *Carver* v. *Crocker,* 43 Tenn. App. 636, 311 S.W. 2d 316; *Hicks* v. *Hicks,* 168 Tenn. 539, 79 S.W. 2d 802; *Polston* v. *Scandlyn,* 21 Tenn. App. 252, 108 S.W. 2d 1105.

While it is true that we have before us a full and complete transcript containing all the testimony and proof regarding the issue pretermitted by the Chancellor, this remaining issue involves an alleged breach of trust which necessarily also involves the creditability of witnesses. We are of the opinion that justice could be better served if a proper finding of fact and decision by the Chancellor, who has had the opportunity to observe the manner and demeanor of the witnesses, was afforded us. Therefore, the cause is remanded to the Chancery Court for a decision and further finding of fact on the remaining issue, which we hold is not barred by laches. The effect of this remand shall not dispose of this cause or displace it from the docket of this Court, but it shall be retained, suspended, until the order of remand be complied with. A finding of fact and decision shall be made by the Chancellor, certified and transmitted to this Court. See as authority for this procedure: *Mynatt* v. *Hubbs,* 6 Heisk. 320,

322; *Nolan* v. *Black*, 3 Shannon Cas. 578; *Mrs. Nannie Lawrence Williams* v. *First National Bank of Dickson*, Middle Section, Court of Appeals, June 18, 1932, unreported, yet cited with approval by the Supreme Court in *Hicks* v. *Hicks*, supra.

An order will be entered remanding this cause to the Chancery Court of Hamilton County so that the Chancellor may prepare and file his written finding of fact and decision on the alleged breach of trust by the Trustee in the 1944 exchange of Cavalier stock, and the same may be certifed by the Clerk and Master to this Court as a part of the record in this cause. After the receipt by this Court of the Chancellor's decision and finding of fact, the parties shall be allowed 20 days from such receipt to file additional Briefs. A copy of this Opinion will accompany the Procedendo on the remand.

Nearn, J.

Carney, P. J.
Matherne, J.

IN THE COURT OF APPEALS OF TENNESSEE
WESTERN SECTION SITTING
AT KNOXVILLE

HAMILTON EQUITY #193

NORMA FRANCES RAOUL CLARK, et al,
Appellants,

vs.

THE AMERICAN NATIONAL BANK &
TRUST COMPANY,
Appellee.

(Filed March 16, 1971)

ON PETITION TO REHEAR

A very courteous and comprehensive Petition for Rehearing and For Finding of Other or Additional Facts has been filed with the Court. However, the Petition must be denied as it raises no new matter for our consideration.

The Petition also seeks to have us apply the Statute of Limitations to the complainants' cause of action, while admitting that, because of the Chancellor's view of the matter, that issue has not been previously raised in this Court. In this case, the applicability or inapplicability of any Statute of Limitations cannot be determined until a decision is reached regarding the remaining issue and conclusions yet to be made by the Chancellor.

The Petition is respectfully denied.

Nearn, J.

Carney, P. J.

Matherne, J.

No. 38441

IN THE CHANCERY COURT, PART 1, OF
HAMILTON COUNTY, TENNESSEE

NORMA FRANCES RAOUL CLARK, et al,
Plaintiffs,

v.

THE AMERICAN NATIONAL BANK
& TRUST COMPANY,
Defendant.

CHANCELLOR'S MEMORANDUM OPINION

(Filed March 15, 1973)

This is an action by the beneficiaries of express trusts against the Trustee Bank to recover for alleged breach of trust in exchanging, in 1944, trust assets consisting of 323 shares of common stock of the Cavalier Corporation of Chattanooga, Tennessee, for an equal number of a new issue of stock in the same company called the "$100.00 par value common" stock. The plaintiffs have alleged that the Trustee violated its duty of undivided loyalty in making said exchange of stock and failed to exercise reasonable care and skill of a paid trustee in making said exchange. The remedy sought by the plaintiffs is to recover from the Bank the value, at the time suit was brought in 1964, of the common stock they would have owned but for said exchange.

Following the original trial, this Court did not determine whether or not the Trustee had committed a breach of trust but decided the case in favor of the Trustee Bank on the ground of laches. However, on appeal, the Court of Appeals reversed the holding of this Court that the defense of laches had been made out and remanded the cause to this Court with the direction that

this Court ascertain whether or not the defendant Bank in fact had violated its trust as alleged. The defendant Bank again has asserted the defense of laches and likewise has pleaded the six-year statute of limitations in bar of the plaintiffs' action. But the Court is duty bound to follow the decision of the Court of Appeals on the question of laches and is further convinced that the Court of Appeals would deny application of the statute of limitations for the same reasons it denied application of the rule of laches. See: Bogert, *Law of Trusts*, Sec. 170 (Hornbook Series). Accordingly, these two defenses of the defendant Trustee must be denied. It is perhaps the duty of the Court to state, however, that, were it free to do so, it would sustain the plea of the statute of limitations as insisted by the defendant Bank.

The Court comes to the issue whether or not the Trustee Bank committed a breach of trust. In determining this question, the actions of the Trustee are to be judged by the facts as they were known to it in 1944 at the time said stock was exchanged and not by any hindsight consisting of the events occurring thereafter.

Two trusts are actually involved. It was the purpose of each to support and educate the plaintiffs, one of whom was 15 years of age and the other 23 years of age in 1944. One consisted of 284 shares of common stock in the Cavalier Corporation, and in it the Trustee was granted broad powers "to sell or exchange any security . . . in any manner which may seem wise." The other trust consisted of 39 shares of the common stock of the Cavalier Corporation, and in this trust instrument the Trustee was not granted any power of sale or reinvestment. One question is whether the law of Georgia or that of Tennessee governs the administration of the trust consisting of the 39 shares, and on this issue it

is the finding of the Court that the law of Tennessee controls and, therefore, that the so-called "prudent man rule" is the proper one to apply to the actions of the Trustee in exchanging these 39 shares for the $100.00 par value stock. It should be noted here that these two particular trusts were later merged into a new trust and 100 additional shares of $100.00 par value stock were added to the corpus in 1949. This additional 100 shares of $100.00 par value stock is in no wise involved in this litigation, but the fact that the two original trusts terminated and were supplanted by the new trust is significant because the Bank insists that the statute of limitations began to run when the two original trusts terminated on October 15, 1956, the date of the death of the father of the plaintiffs.

The date of the exchange of the common stock for the $100.00 par value stock was October 31, 1944 and at that time two of the directors of the Trustee Bank, Mr. E. Y. Chapin and Mr. Gaston C. Raoul, were at the same time directors of the Cavalier Corporation, had been serving in such dual capacities for several years, and each owned stock in the Cavalier Corporation. Mr. Chapin had been Chairman of Cavalier's board of directors in 1941. Cavalier's account was one of the more important accounts of the Bank at that time and the Bank also acted as Cavalier's transfer agent.

The exchange in question grew out of a plan of recapitalization of Cavalier conceived over a period of many months by Mr. Gaston C. Raoul who had devoted most of his life to the development of Cavalier. One of his primary motives appears to have been to transmit his large holdings in Cavalier to his son and to Mr. Lane, his business associate of many years, and to do so in a manner calculated to hold Federal death taxes

or gift taxes to the very minimum. The Cavalier Corporation constituted Mr. Raoul's consummate interest.

Before the exchange, Cavalier had outstanding 8,872 shares of common stock and of this total Mr. Gaston Raoul and his family of brothers, sisters, neices and nephews owned 6,973 shares. After considering various plans, he finally decided upon the one here in litigation and did everything within his power to see that it was carried out. He wrote many letters advising and even urging his relatives to exchange their common stock for the new $100.00 par value stock.

The new $100.00 par stock was, in effect, a preferred stock. It was preferred in dividends up to $2.50 per year, if earned and declared, but it was limited to a total of $7.50 per year in dividends. It was subject to redemption on 90 days' notice at $100.00 per share plus accrued dividends and, in the event of liquidation, it was preferred over the common to the extent of $100.00 per share, but was not entitled to share in liquidation beyond that amount. It had no right to vote unless the $7.50 dividend was not paid or the company failed to maintain current assets of 150% or more of the amount of par stock outstanding. Of course, the common stock was the equity stock of the company with unlimited right to dividends and to assets upon liquidation after the preference just mentioned, and it had the sole voting control, with the two exceptions above mentioned.

Holders of the common stock were given the option of exchanging their stock for the new $100.00 par stock between October 31, 1944 and December 31, 1944. Mr. Gaston C. Raoul had little difficulty in leading nearly all the other holders of common stock likewise to exchange for the new $100.00 par stock; after all, he had

built the company and, presumably, knew best. 7,389 shares of the common stock were exchanged for the $100.00 par value stock, leaving the equity ownership of the company in the 1,383 shares of common stock remaining unexchanged. The Trustee Bank exchanged the stock it held in the plaintiffs' trusts on the very first day of the exchange period.

The Court will now consider the book value, earning capacity, dividends, liquidation and voting rights of these two stocks. Immediately prior to the exchange, 8,772 shares of common stock were outstanding and the book value of each share was approximately $298.05. *By simple arithmetic, it is apparent that immediately upon exchanging a share of said common stock for a share of the new $100.00 par stock the person exchanging has given away $198.05 of the net worth of the company to those who continued to hold the common stock.* This makes a total of $1,463,391.45 of the net worth of the company which by reason of the exchange was transferred from those stockholders who exchanged to the holders of the common stock who did not exchange. Thus, if the defendant Trustee had not exchanged the common stock in these trusts for the $100.00 par stock *it would have gained $1,050.13 in book value or net worth per share of the common stock in the plaintiffs' trusts,* or a total benefit to the plaintiffs of $341,775.99. This fact, coupled with the fact that the common stock was not limited in the amount of dividends which could be paid to its holders and the fact that there was no limitation of the amount the common stock would share upon liquidation of the company, after payment of the $100,000 par, convinces the Court that the Trustee violated the prudent man rule in making the exchange of common stock for the $100.00 par value stock. Section 176 of the *Restatement of Trusts* states, "The trustee

is under a duty to the beneficiary to use reasonable care and skill *to preserve the trust property.*" (Emphasis added.) The right of unlimited sharing in liquidation was an important factor in the mind of Mr. Raoul in planning the recapitalization as shown by a memorandum written by him dated June 30, 1944 in which he said: "Theoretically this common stock (no par) is never worth to its holder more than cost plus appreciation, but suppose some day a good opportunity arises and the company is sold out lock, stock and barrel. There might be very few common shares outstanding at that time, but surely they would receive everything after satisfaction of the preferred and A ($100.00 par) shares. They might thereby make a killing (less taxes) but the A ($100.00 par) should not care as it would first have to be paid off in full." The old gentleman could not have known how right he was in view of the sale in 1963 of Cavalier to Seeburg, lock, stock and barrel, for $9,413,188.00, plus 120,000 shares of Seeburg no par common stock of the value of 23 3/8 per share, or a total consideration of $12,098,188.00.

Aside from the net worth, or book value, of the respective stocks, it should be noted that beginning in 1940 Cavalier earned $5.03 per share of common stock, in 1941, $22.94 per share, in 1942, $9.23 per share, in 1943, $9.63 per share and in 1944, $12.67 per share. Mr. Gaston Raoul reported to the Board of Directors on October 21, 1943, "I am glad to report that earnings for the current year are entirely satisfactory. . ."

Further, although dividends had not been paid for several years *prior to 1944,* dividends were paid on the common stock *in 1944* prior to the proposed exchange as follows: April 19, 1944—$1.00 per share; July 18, 1944—$.50 per share; October 18, 1944—$.50 per share.

The defendant Trustee Bank, through its directors Mr. Gaston Raoul and Mr. E. Y. Chapin, knew that for the year 1944 profits after taxes would amount to between $175,000.00 and $200,000.00. Since the earning power of stock is one of the prime characteristics thereof, it should be noted that for the year 1944 the earnings per share of common stock before the recapitalization was $14.67, but after the recapitalization and assuming that the Trustee had not exchanged the 323 shares in the plaintiffs' trusts and that maximum dividends of $7.50 a share had been paid on the $100.00 par value stock, the earnings per common share would have jumped from said $14.67 per share to $52.97 per share, or an increase of $38.30 per share.

Weighing all of these factors, the Hon. Forrest Hodge O'Neal, Dean of the Duke University Law School and a specialist in closely held corporations, testified that no reasonably prudent businessman would have exchanged the Cavalier common stock for the $100.00 par stock at the end of 1944, and that the new $100.00 par value shares were of *substantially less value* than the equity stock which the defendant Trustee exchanged for them. Likewise, Mr. William G. Stiegelmier, a specialist in the valuation of stocks in closely held corporations, testified that although the purpose of the trusts was to educate the plaintiffs, it was most imprudent for the Trustee in 1944 to exchange the 323 shares of common stock held in the trust for the new $100.00 par stock. Mr. William E. Heer, a professional investment counsel with 35 years' experience, testified that as of December 31, 1944, immediately after the exchange, the common had a value of $745.00 per share while the new "$100.00 par" had a value of only $80.00 per share. In conclusion on this phase of the case, the Court is of the opinion that the Trustee breached its

duty as stated in Section 174 of the *Restatement of Trusts*, to wit:

> "The trustee is under a duty to the beneficiary in administering the trust to exercise such care and skill as a man of ordinary prudence would exercise in dealing with his own property; and if the trustee has greater skill than that of a man of ordinary prudence, he is under a duty to exercise such skill as he has." See also: *Knox County* v. *Fourth & First Nat. Bank*, 181 Tenn. 569, 182 S.W.2d 980, 984.

The Court now deals with the contention of the plaintiffs that the Trustee violated its duty of loyalty. See: Bogert, *Law of Trusts*, Sec. 95, (Hornbook Series); 54 *Am.Jur.* 247, Trusts, Sec. 312. That duty is stated in Section 170 of the *Restatement of Trusts* as follows:

> "(1) The trustee is under a duty to the beneficiary to administer the trust *solely* in the interest of the beneficiary. (Emphasis added.)
>
> (2) The trustee in dealing with the beneficiary on the trustee's own account is under a duty to the beneficiary to deal fairly with him and to communicate to him all material facts in connection with the transaction which the trustee knows or should know."

Further, under Comment "p" to said Section 170, is the following, to wit:

> "Action in the interest of a third person. The trustee is under a duty to the beneficiary in administering the trust not to be guided by the interest of any third person. Thus, it is improper for the trustee to sell trust property to a third person *for the purpose of benefiting the third per-*

son rather than the trust estate." (Emphasis Added.) See also: *Cowan* v. *Hamilton Nat. Bank,* 177 Tenn. 94, 146 SW2d 359, 367.

It is obvious that in this case Mr. Gaston Raoul, while acting as a director of the Trustee Bank and thus onerated with the duties of undivided loyalty owned by a Trustee to his beneficiaries (Plaintiffs) was at the same time acting in *his own personal interest* in carrying out his personally devised scheme of recapitalization, the ultimate aim of which was to place equity ownership of the Cavalier Corporation in his son and close associate, Mr. Lane, while paying little or no Federal taxes.

Eleven years later on August 2, 1954, Mr. Raoul, in a personal memorandum, stated:

> "Incidentally, *Mr. Chapin disapproved of the idea in toto as being a giveaway* of the then principal owners to the no par stockholders who might elect not to exchange. I disagreed with him, and after 11 years still do. *He went along with the plan, however, like the loyal friend he always was.* W.C.R." (Emphasis added.)

This memorandum of Mr. Raoul was with respect to the 1944 stock exchange. Said memorandum is very revealing in two respects. First, it tells us that "Mr. Chapin disapproved of the idea in toto as being a giveaway", and, secondly, that Mr. Chapin, who handled these trusts for defendant Bank, failed to exercise in behalf of the trust beneficiaries his said judgment of disapproval but "went along with the plan however, like the loyal friend he always was." These actions by Mr. Raoul and Mr. Chapin appear to be precisely what Section 170 of the *Restatement of Trusts* states is a violation by the Trustee of its duty of loyalty.

It appears that Mr. Raoul viewed the plan almost solely from a standpoint of achieving his own personal estate objectives rather than from the standpoint of *Trustee for the plaintiffs.* It is understandable how Mr. Raoul could disagree with Mr. Chapin as indicated by said memorandum because to Mr. Raoul the plan was accomplishing *his* estate plan objectives. He did not wish his estate to enlarge as the company grew. From the standpoint of death taxes, the plan had the effect of shifting high value assets (no par common stock, book value of $298.05) out of his estate so that he might hold low value assets ($100.00 par common stock) and thereby defeat death taxes. If he had made an *inter vivos* gift he would have incurred Federal gift taxes and the objectives of his bounty would not have received as much as they would have received under his plan. But Mr. Chapin must have viewed the whole scheme from a different aspect; his only personal interest was friendship for Mr. Raoul. The new stock was subject to redemption for $100.00 per share, representing a "give away" of $198.05, of book value and the earnings and dividends that went with it. Mr. Gaston Raoul did not regard this as a give away *for him* because he was giving *to his son and business associate, Mr. Lane,* and his family was retaining what he deemed sufficient voting control to protect their remaining investment. Finally, the Trust assets were always vulnerable to redemption for the sum of $32,300.00.

Nowhere does the record indicate that the Trustee Bank ever disclosed to anyone acting on behalf of the plaintiffs the effects that the exchange of stock hereinabove outlined would have on these trusts. See: *Knox County* v. *Fourth & First Nat. Bank, supra,* at P. 986. It seems of great importance to the Court

that the Trustee Bank was chargeable with notice not only of what Mr. Chapin knew, but also of what Mr. Gaston Raoul knew about the recapitalization plan, the prospects for Cavalier and the advantages and disadvantages of the two stock issues, and he knew just about all there was to know.

Section 205 of the *Restatement of Trusts* provides:

> "If the trustee commits a breach of trust, he is chargeable with
>
> (a) any loss or depreciation in value of the trust estate resulting from the breach of trust; or
>
> (b) any profit made by him through the breach of trust; or
>
> (c) any profit which would have accrued to the trust estate if there had been no breach of trust."

Section 206 of the Restatement of Trusts provides:

> "The rule stated in Sec. 205 is applicable where the trustee in breach of trust sells trust property to himself individually, or sells his individual property to himself as trustee, *or otherwise violates his duty of loyalty.*" (Emphasis added.) See also: Bogert, *Law of Trusts,* Sec. 157, (Hornbook Series).

It is the opinion of the Court that the rule stated in Section 205 (c) and in Section 206 of the *Restatement of Trusts* is the proper rule to be applied in this case. According to the computations in the plaintiffs' brief, the application of said rule of damages, after allowing credit for the $32,300.00 already paid plaintiffs, results in a net recovery to the plaintiffs of the sum of $2,540,256.11, plus any surplus in dividends paid on the common stock since 1944 over and above that paid on the

$100.00 par stock. As suggested in the briefs, the case will be referred to the Master for appropriate findings as to the precise sum due in accordance with this decision. Solicitor for plaintiffs shall submit an appropriate decree.

March 15, 1973.

/s/ Ray L. Brock, Jr.
Chancellor—Part 1

No. 38,441
IN THE CHANCERY COURT OF HAMILTON COUNTY, TENNESSEE

NORMA FRANCES RAOUL CLARK, ET AL
Plaintiffs
vs.
AMERICAN NATIONAL BANK & TRUST CO.
Defendant

FINAL DECREE

This cause came on to be heard on the Report of the Master, as ordered in the Decree of this Court entered on June 22, 1973, and the Master, having filed his Report, showing a computation of interest to December 20, 1973, said report is hereby incorporated herein by reference.

It is accordingly

ORDERED, ADJUDGED and DECREED that the Plaintiffs have and recover from the Defendant the total sum of $3,941,799.74 plus the costs of this cause for which execution may issue if necessary.

A lien is hereby declared upon said recovery covering the attorneys' fees of Tanner and Jahn, Attorneys for the Plaintiffs, in such amount as is evidenced

by their agreement with the Plaintiffs at such time as adjudication of this cause becomes final.

The Chancellor's opinion and the Report of the Master shall constitute a finding of fact and decision by this Court and the Clerk and Master is ordered to certify and transmit same to the Court of Appeals as a part of the record in this cause.

Enter this 27 day of December, 1973.

/s/ Ray L. Brock, Jr.
Chancellor

IN THE COURT OF APPEALS OF TENNESSEE
AT JACKSON

Hamilton Equity

Norma Frances Raoul Clark, et al,
Original Appellants,
vs.
American National Bank and Trust Company
of Chattanooga,
Original Appellee.

OPINION

(Filed August 30, 1974)

This is a trust case involving an alleged breach of trust and it is the second time that the matter has come before this Court. Previously, this Court remanded for additional findings by the Chancellor.

In the original complaint, filed in 1964, the beneficiaries of express trusts charged the defendant Trustee, American National Bank and Trust Company of Chattanooga, Tennessee, with negligence in the exchange of certain stocks held in trust; in failing to prevent the

redemption of the exchanged stock by appropriate court action; and breach of trust.

The main thrust of the complaint was that the Trustee had committed a breach of trust in 1944 when certain shares of trust stock were exchanged for a different type of stock in the same corporation. Prior to the complained of 1944 transfer of stock the Trustee held shares of Cavalier Corporation "no-par" common stock. These shares were voting shares with no dividend preference and would share equally on dissolution of the Corporation. In 1944 the "no-par" common stock was voluntarily exchanged by the Trustee for a like number of what was termed "$100.00 par value common stock". The par value stock enjoyed dividend preference and was subject to redemption by the Corporation.

In 1963 Cavalier called in and redeemed the $100.00 par value stock at $100.00 per share. Approximately four months thereafter Cavalier was sold to Seeburg Corporation for approximately 12 million dollars and Cavalier was liquidated. The holders of common stock in Cavalier participated in the division of the sale proceeds upon dissolution while the former holders of $100.00 par value stock did not. This fact precipitated this suit.

In addition to charging a breach of trust in the 1944 transaction, complainants contended at the first trial that the "$100.00 par value common stock" had the right to participate with other common shareholders on liquidation.

At the first trial the Trustee contended that the breach of trust claim was barred by the doctrine of laches and even if it were not, there had been no breach. Further, the $100.00 par value stock was not

entitled to share upon liquidation with the no-par common stock.

The Chancellor held: (a) the "$100.00 par value common stock" was not true common stock but was preferred as to dividends and its par value; (b) upon liquidation it did not share with the common stock in the overage after payment of its par value; and (c) the plaintiffs were barred by the doctrine of laches on the breach of trust issue and, consequently, made no fact finding on that point.

On appeal, we affirmed the Chancellor's holding regarding the nature of the "$100.00 par value common stock", but reversed the Chancellor's holding regarding the application of the doctrine of laches and remanded for a finding of fact on the pretermitted issue.[1]

On remand, the Trustee, having lost the issue regarding laches, raised the issue of the statute of limitations as set out in T.C.A. § 28-309, and again insisted that the facts did not constitute a breach even if the claim was not barred by the statute of limitations.

The Chancellor has filed his finding of fact and conclusions and held that T.C.A. § 28-309 was not a bar to the suit and that the Trustee had committed a breach of trust in 1944 in exchanging the "no-par" value stock for the "$100.00 par value stock". Judgment in the amount of $3,941,799.74 was rendered against the Trustee.

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1. In an effort to have this Opinion conform to some degree of reasonableness in length, we will not reiterate here our reasons for our previous holding, as a copy of our previous Opinion may be obtained from the Clerk of this Court by those who have an interest in that portion of these proceedings.

Now the Trustee appeals and insists that the Chancellor erred in not sustaining the plea of the statute of limitations as well as in holding there had been a breach of trust. In addition, it is also insisted that the Chancellor erred in the manner of assessment of damages and interest.

For an understanding of this matter it is necessary to give some history of the trusts involved.

Gaston C. Raoul, uncle of Anne Raoul and Norma Raoul, planted the seed of the trusts in 1932. In that year, Gaston Raoul, the President of Tennessee Furniture Company and its prime movant, gave in trust to the defendant Trustee 124 shares of the company's no-par value common stock.[1] The trust was for the benefit of his nieces, Anne and Norma Raoul, the complainants, and their father, Norman Raoul, who was Gaston's brother.

Subsequently, Gaston purchased from Norman his brother's interest in their father's (W. G. Raoul) estate. Gaston then gave in trust as additional corpus this interest, which included 160 shares of Cavalier no-par value common stock.

Complainants' grandmother, Mary M. Raoul, by testamentary disposition increased the trust corpus by 39 shares of Cavalier no-par value common stock.

Thus, it may be seen that at this point there were 323 shares of Cavalier no-par value stock held in trust. The trust provided that it was to terminate upon the youngest of the nieces reaching twenty-five years

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1. Tennessee Furniture later came to be known as Cavalier Corporation and in all references in this Opinion all stock will be referred to as that of Cavalier.

of age and the death of their father Norman Raoul, but in no event prior to Norman's death. Beneficiary Anne Raoul was born June 2, 1921, and Norma was born August 15, 1929. Norman Raoul died October 15, 1956.

In late 1949, prior to Norman Raoul's death, Gaston Raoul, the settlor became of the opinion that it would be better if the corpus was held in trust for the lifetime of his nieces instead of being distributed to them upon the death of their father, Norman Raoul. Therefore, Gaston proposed to deposit 50 shares of $100.00 par value shares of Cavalier stock[1] in a trust if Anne Raoul, who was over 21 years of age, would agree to place her expected share of the first trust, when that trust terminated, in trust with the 50 shares offered by Gaston. He also proposed to deposit an additional 50 shares of the same stock in that trust if Norma would likewise agree and would ratify the agreement upon reaching 21 years of age. Both Anne and Norma agreed; with Norma confirming the new trust arrangements subsequent to attaining majority. Of course, Norma Raoul, a beneficiary of the first trust, was not and could not be a party to the agreement as the first trust, according to its terms, was to terminate upon his death and the corpus distributed to his daughters. Gaston Raoul had in this manner placed 100 shares of $100.00 par value Cavalier stock in trust; which trust existed contemporaneously with the first trust until the first fell in upon the death of Norman in 1956. The named trustee of the second

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1. In the 1944 transaction, both the trustee and Gaston Raoul had voluntarily exchanged their no-par value stock for $100.00 par value stock, so at the time of the new agreement the 100 shares offered by Gaston and the 323 held by the Trustee were all $100.00 par value shares.

trust was the same as the first, that is, the defendant, the American National Bank and Trust Company of Chattanooga.

Hence, at one point in time there existed two separate trusts with the same named Trustee. One, the first in time, consisting of 323 shares, which is the subject of this suit, and the second consisting of 100 shares with which this litigation is not concerned.

While the Trustees of the trust were the same, neither the corpora, settlors, beneficiaries, or terms were the same. In the first trust, we may consider Gaston C. Raoul as the settlor with Anne, Norma and Norman Raoul as named beneficiaries with termination conditioned upon the death of Norman. In the second trust Gaston, Anne and Norma Raoul are the named settlors with Anne and Norma as the named beneficiaries with termination upon the death of Anne and Norma. The general purpose of the first trust was to provide for the maintenance and education of Norma and Anne Raoul and the maintenance of their father, Norman, if needed. However, the dominant purpose of that trust was to provide for Norma and Anne. The sole purpose of the second trust was to provide for Norma and Anne. The second trust contained a spendthrift clause while the first did not. Also, there existed contemporaneously for a time two distinct corpora; the first consisting of 323 shares and the second consisting of 100 shares.

Upon the death of Norman Raoul on October 15, 1956, the defendant Trustee transferred the 323 shares from the first trust to the corpus of the second.

Now, a brief summary of the events of 1944. Cavalier Corporation represented the life's work of Gaston

C. Raoul. He was justly proud of his business and in 1944 began to contemplate about its future when death would remove him as captain of the ship. Over the years Cavalier had done its banking with the defendant bank. Mr. E. Y. Chapin, a director of the bank and a trust officer, became a personal friend of Gaston Raoul. Chapin also owned a few shares of Cavalier stock. In the year 1944 both Chapin and Raoul were members of the board of directors of both the defendant bank and Cavalier. Gaston conceived the idea of the $100.00 par value stock. His fear was that after his death the Corporation would be "absentee" owned, that is, those who were actively engaged in the day to day operation of the Corporation would not be common shareholders and as a consequence the business would suffer for lack of real concern by those who were operating it. Also, as will be later shown, the exchange of common stock for par value stock would have definite tax benefits for Gaston Raoul. Therefore, he proposed that the Corporation offer to exchange $100.00 par value stock with dividend preference on a share-for-share basis for common stock. The ultimate hoped for result would be that those who did not actively contribute to the running of the business would exchange their common stock for the preferred stock, which would have the effect of making the common ownership stock available by purchase or bonus incentive to those who actually ran the business. Gaston Raoul discussed and conferred with E. Y. Chapin about this plan. The offer was made to the stockholders in 1944 and nearly all of the "absentee" owners, including the defendant Trustee and Gaston Raoul, exchanged the no-par value common stock for the $100.00 par value preferred.

It is not in dispute that T.C.A. § 28-309 is applicable to trusts. See *Third Nat. Bk.* v. *Nashville Trust Co.* (1950) 191 Tenn. 123, 232 S.W. 2d 7. The statute provides in effect that this action "shall be commenced within six (6) years after the cause of action accrued."

It has been generally stated that a statute of limitations does not apply to express trusts. However, the misconception that the foregoing generality has created was interred by our Supreme Court in the case of *Third Nat. Bk.* v. *Nashville Trust Co.*, supra, when the Court stated:

> "The rule that no statute of limitations applies to express trusts, has been widely and loosely stated. The equitable theory upon which the rule was based was that since in equity, the *possession* of the trustee was the possession of the *cestui que* trust and so could not be adverse, that no legal statute of limitations could commence to run until the possession was adverse. That the rule is limited to the time that the trustee is in possession of trust funds, and to the continuing relation of the parties as trustee and *cestui que* trust, is abundantly clear from the early cases cited in Judge Catron's opinion in Armstrong's Heirs v. Campbell, 11 Tenn. 201, 24 Am. Dec. 556. Our research was limited by the availability of these old cases to Beekford v. Wade, 17 Ves. 96, and Melvy v. Cawley, 4 Price 107. In the course of his opinion, Judge Catron said, 11 Tenn. at page 227: 'Although a trustee cannot, in general, set up his possession in opposition to his cestui que trust, or plead the statute of limitations against him, so long as the relation of trustee and cestui que trust subsists between them, yet if that relation is once

dissolved, or if the trustee to the cestui que trust notice that he intends to hold in opposition to him, the statute of limitations will run.' "

In the course of that opinion the Court quoted with approval the rule as set out in Corpus Juris as follows:

" 'In order to set the statute in motion in favor of the trustee the trust must terminate, as by its own limitation or by settlement of the parties, or there must be a repudiation of the trust by the trustee and an assertion of an adverse claim by him, and the fact made known to the cestui que trust. This proposition is well established by all the numerous cases in which the question has arisen, there is no conflict of authority whatever upon the subject.' 37 C. J., Limitations of Actions, Section 267, pp. 903-904-905; 54 C. J. S., Limitations of Actions, Section 178." (191 Tenn. 130-31) (Emphasis supplied)

By its terms, the first trust terminated on October 15, 1956, upon the death of Norman Raoul. The second trust was already in existence on that date. The second trust cannot be simply an extension of the first trust as argued by counsel for the beneficiaries. The only common denominator between the two trusts is the name of the Trustee, American National Bank and Trust Company of Chattanooga. There is no proof in this record that the Trustee attempted in any manner to induce the beneficiaries of the first to create the second for any reason, much less for the reason of "covering up" any past mistakes. The second trust was based on the agreement between the nieces and their uncle, that the nieces would place in a trust what was theirs personally when they were entitled to it, if their uncle would also place in that trust 100 shares.

On October 15, 1956, the corpus of the first trust became the personal property of the nieces to do with it as they saw fit. They saw fit to place that corpus in another trust already created. Therefore, the statute of limitations in this case would begin to run on the first trust on the date of its termination, October 15, 1956, for the Trustee no longer had any duties under that trust and, in effect, turned over the corpus to the beneficiaries, who had by prior agreement agreed to place it in another trust; unless it can be said that fraud is involved.

In *Bates* v. *Preble,* 151 U.S. 149, 14 S.Ct. 277, cited in *Hall* v. *DeSaussure* (1956 W.S.) 41 Tenn. App. 572, 297 S.W. 2d 81, it was said, " ' - - - if the fraud be secret in its nature, and such that its existence cannot be readily ascertained, or if there be fiduciary relations between the parties, there need be no evidence of a fraudulent concealment other than that implied from the transaction itself.' "

We must therefore determine if the 1944 exchange itself was a fraudulent transaction. Evidently the Chancellor was not of the opinion that the transaction of 1944 was a fraudulent transfer for he did not so find. The Chancellor held, after an exhaustive finding of fact, that the Trustee in the 1944 transaction failed in its duties as set out in Section 174 of the *Restatement of Trusts,* to wit:

> " 'The trustee is under a duty to the beneficiary in administering the trust to exercise such care and skill as a man of ordinary prudence would exercise in dealing with his own property; and if the trustee has greater skill than that of a man of ordinary prudence, he is under a duty to exercise such skill as he has.' "

In other words, the Chancellor found that the Trustee violated the prudent man rule.

Expert testimony was adduced on both sides of this controversy concerning the prudent advisability of exchanging or not exchanging the stock. The experts properly viewed the exchange in the light of circumstances existent in 1944. The Trustee's expert witnesses testified in that light and not judging by hindsight were of the opinion the exchange was prudent. On the other hand, expert witnesses for the beneficiaries viewed the exchange in the same light and through the same sight and were of the opinion the exchange was not prudent. The Chancellor accepted the testimony of the latter and we cannot say the evidence preponderates against the finding that the exchange was imprudent. However, an imprudent mistake, even a bad one, does not make out a case of fraud and we hold the proof does not warrant such conclusion.

Nevertheless, it is argued that whether a mistake be fraud or not, if the cause of action is concealed from the beneficiaries, the concealment thereof is fraud and a fraudulent concealment will toll the statute. "It is not the fraud, but its concealment by the party perpetrating it, unmixed with fault or negligence on the part of him who complains, which works this result." *Woodfolk* v. *Marley* (1897) 98 Tenn. 467, 40 S.W. 479, at page 471.

Absent a fiduciary relationship that concealment must be evidenced by some overt act, but where a fiduciary relationship exists and there is the duty to speak, mere silence may constitute a fraudulent concealment. Pomeroy, *Equity Jurisprudence*, 5th Edition, § 902 page 550; *Simmons* v. *Evans* (1947) 185 Tenn.

282, 206 S.W. 2d 295; *Sewing Machine Company* v. *Jackson* (1885) 83 Tenn. 418.

Immediately prior to the 1944 transfer of stock, the Trustee, through a trust officer (not Mr. Chapin) discussed the matter of the exchange of stock with Norman Raoul, beneficiary of the first trust and father of the co-beneficiaries, Anne and Norma. Norman gave the Trustee permission for the transfer and stated: "It is entirely satisfactory with me to exchange any Cavalier old stock for the new Cavalier stock that you are holding in trust for my children." The exchange in 1944 was in no manner hidden from anyone. After the exchange, the records of the Trustee indicated that the stock was $100.00 par value stock where before it had been listed simply as shares. In short, there was no physical concealment from anyone of the transaction itself.

It is the position of the beneficiaries that Mr. Chapin was of the opinion that the exchange was not in the best interest of the beneficiaries and he was under a duty to reveal to the beneficiaries any uncertainty in his mind regarding the soundness of the stock exchange. This brings us to the Chancellor's finding that the Trustee breached its duty of loyalty. On that point we copy from the Chancellor's opinion:

> "The Court now deals with the contention of the plaintiffs that the Trustee violated its duty of loyalty. See: Bogert, *Law of Trusts,* Sec. 95, (Hornbook Series); 54 Am.Jur. 247, Trusts, Sec. 312. That duty is stated in Section 170 of the Restatement of Trusts as follows:
>
> > '(1) The trustee is under a duty to the beneficiary to administer the trust *solely* in the interest of the beneficiary. (Emphasis added.)

(2) The trustee in dealing with the beneficiary on the trustee's own account is under a duty to the beneficiary to deal fairly with him and to communicate to him all material facts in connection with the transaction which the trustee knows or should know.'

Further, under Comment "p" to said Section 170, is the following, to wit:

'Action in the interest of a third person. The trustee is under a duty to the beneficiary in administering the trust not to be guided by the interest of any third person. Thus, it is improper for the trustee to sell trust property to a third person *for the purpose of benefiting the third person rather than the trust estate.*' (Emphasis Added.) See also: *Cowan* v. *Hamilton Nat. Bank,* 177 Tenn. 94, 146 SW2d 359, 367.

"It is obvious that in this case Mr. Gaston Raoul, while acting as a director of the Trustee Bank and thus onerated with the duties of undivided loyalty owed by a Trustee to his beneficiaries (Plaintiffs) was at the same time acting in *his own personal interest* in carrying out his personally devised scheme of recapitalization, the ultimate aim of which was to place equity ownership of the Cavalier Corporation in his son and close associate, Mr. Lane, while paying little or no Federal taxes.

"Eleven years later on August 2, 1954, Mr. Raoul, in a personal memorandum, stated:

'Incidentally, *Mr. Chapin disapproved of the idea in toto as being a giveaway* of the

then principal owners to the no par stockholders who might elect not to exchange. I disagreed with him, and after 11 years still do. *He went along with the plan, however, like the loyal friend he always was.* W.C.R.' (Emphasis added.)

This memorandum of Mr. Raoul was with respect to the 1944 stock exchange. Said memorandum is very revealing in two respects. First, it tells us that 'Mr. Chapin disapproved of the idea in toto as being a giveaway', and, secondly, that Mr. Chapin, who handled these trusts for defendant Bank, failed to exercise in behalf of the trust beneficiaries his said judgment of disapproval but 'went along with the plan however, like the loyal friend he always was.' These actions by Mr. Raoul and Mr. Chapin appear to be precisely what Section 170 of the *Restatement of Trusts* states is a violation by the Trustee of its duty of loyalty.

"It appears that Mr. Raoul viewed the plan almost solely from a standpoint of achieving his own personal estate objectives rather than from the standpoint of *Trustee for the plaintiffs.* It is understandable how Mr. Raoul could disagree with Mr. Chapin as indicated by said memorandum because to Mr. Raoul the plan was accomplishing *his* estate plan objectives. He did not wish his estate to enlarge as the company grew. From the standpoint of death taxes, the plan had the effect of shifting high value assets (no par common stock, book value of $298.05) out of his estate so that he might hold low value assets ($100.00 par common stock) and thereby defeat death taxes. If he had made an *inter vivos* gift he would have

incurred Federal gift taxes and the objectives of his bounty would not have received as much as they would have received under his plan. But Mr. Chapin must have viewed the whole scheme from a different aspect; his only personal interest was friendship for Mr. Raoul. The new stock was subject to redemption for $100.00 per share, representing a "give away" of $198.05, of book value and the earnings and dividends that went with it. Mr. Gaston Raoul did not regard this as a give away *for him* because he was giving *to his son and business associate, Mr. Lane,* and his family was retaining what he deemed sufficient voting control to protect their remaining investment. Finally, the Trust assets were always vulnerable to redemption for the sum of $32,300.00.

"Nowhere does the record indicate that the Trustee Bank ever disclosed to anyone acting on behalf of the plaintiffs the effects that the exchange of stock hereinabove outlines would have on these trusts. See: *Knox County* v. *Fourth & First Nat. Bank, supra,* at P. 986. It seems of great importance to the Court that the Trustee Bank was chargeable with notice not only of what Mr. Chapin knew, but also of what Mr. Gaston Raoul knew about the recapitalization plan, the prospects for Cavalier and the advantages and disadvantages of the two stock issues, and he knew just about all there was to know."

It should be noted that in Gaston Raoul's memorandum, upon which the Chancellor placed so much weight, it was stated that Chapin "disapproved of the idea in toto, as being a giveaway by the then principal owners to the no par stockholders who might elect not

to exchange." The memorandum was a note written by Gaston to himself evidently in 1956 when he was in a reminiscing mood and was in reference to a letter of 1944 that had been transmitted to the directors of Cavalier explaining the nature of the then proposed new issue of $100.00 par value stock. The letter had nothing to do with trust stock but was the embodiment of the idea for the "new" stock. It appears to us that Gaston Raoul was saying that Chapin disapproved the idea of the new $100.00 par value stock because it was a "giveaway" of ownership by the then principal owners but that Chapin eventually went along with the plan. If this be a proper interpretation of the minds of Gaston Raoul and Chapin, both now being dead and unable to tell us differently, what does that opinion of disapproval of the stock issue and the "giveaway" feature of equity ownership have to do with the manner which Chapin was obligated to view the securities from an investment standpoint? Issues of non equity ownership stock, with preferred dividends could legitimately be considered by a trustee as a better trust investment than equity ownership stock, dependent upon circumstances. In other words, Chapin may have felt that Gaston and the other large equity owners may have been cutting their own throats as to real ownership in the Corporation; but as Trustee entrusted only with relatively few shares of stock with no real ownership say-so, also have felt that the interests of his beneficiaries would be better served with preferred income. Chapin could disagree with the wisdom of Gaston's plan in so far as Gaston was concerned, and still be of the opinion that the new stock issue was best for his beneficiaries. It is interesting to note that Chapin also exchanged the few shares of common stock that he and his wife owned for the $100.00 par value stock

about the same time the trust stock was exchanged. Chapin handled his personal stock in the same manner as he did that of the trust. If he intended to help Gaston at the expense of the trust by the exchange he also intended to injure himself.

There is no proof in this record, other than the various interpretations placed by counsel on the Gaston memorandum, that would indicate that Chapin ever acted as Trustee without the best of motives. His judgment and that of the other members of the trust committee of the defendant bank may have been wrong, as evidently it was; and they may not have given the then present and future prospects of Cavalier their proper due, as evidently they did not; but we are unable to find proof upon which we could base the conclusion that Chapin had knowledge of his mistake and failed to reveal such to the beneficiaries.

Therefore, in so far as the actions of Chapin are concerned, we disagree with the Chancellor and do not find that Chapin breached his duty of loyalty to the trust.

We now turn to that portion of the Chancellor's holding wherein he held that since Gaston was a director of the Trustee bank he was also a Trustee of the trust and any knowledge he had concerning the advisability of the exchange was imputed to the bank as Trustee.

Gaston Raoul was not a trust officer of the bank. He was a director and, as far as this record is concerned, he did not act in an advisory capacity or otherwise in the management of the trust department. Nothing that he knew about his own Corporation was ever acquired by virtue of his capacity as director of the

bank. There is no proof that Gaston Raoul ever assumed to act in any manner in the capacity of a Trustee.

The general rule as stated in Fletcher's Cyclopedia, Corporations, Permanent Edition, Vol. 3, §808 p. 72, is as follows:

> "Information not acquired in the course of his employment, or by or in performance of some duty as agent or director owing to the corporation, is not imputed to the corporation, because the director is under no obligation to communicate such knowledge to the corporation, and the corporation is not presumed to have been informed by the director of what he ascertained in that transaction. Accordingly, the knowledge of a member of the board of directors of a banking corporation cannot in law be attributed to the bank, where it does not appear that at the time he was in any way engaged in the bank's business, or acting in its behalf, . . ."

We are of the opinion that the general rule, as above stated, is the rule of this State.

The Chancellor seemed to consider the tax advantages to Gaston's estate as the personal motive which induced Gaston in some manner to sway the mind of Chapin so that the shares held in trust would be exchanged. This theory will not bear scrutiny. Whether or not the shares in trust were exchanged would have no bearing on Gaston's estate or the tax liability thereon. Gaston had already parted with the ownership of those shares, when, during his lifetime he placed them in trust. They never could become part of his estate and there would be no tax advantage to him one way or the other.

Therefore, we hold that the Chancellor was in error when he held that Gaston Raoul as Trustee had breached his duty of loyalty.

All of what we have said before being true, counsel for beneficiaries argues that the reasons we gave in our first opinion for overruling the Chancellor on the question of laches are good and sufficient reasons for not applying the statute of limitations.

It should be noted that the Chancellor was of the opinion that the statute of limitations was a good plea in bar, but he was convinced that the Court of Appeals would deny the application of the statute for the same reasons it denied application of the rule of laches in the first appeal and commented as follows:

> "It is perhaps the duty of the Court to state, however, that, were it free to do so, it would sustain the plea of the statute of limitations as insisted by the defendant Bank."

In the first appeal of this case, the beneficiaries of the trust had lost in the lower court on the basis of the Chancellor sustaining the plea of laches. The appeal was directed to the Chancellor's error in applying the doctrine of laches. Of course, the appellant-beneficiaries did not raise the additional defense of the statute of limitations. Nor did the Trustee on that appeal raise the defense of the statute of limitations. The first appeal was determined on the question of laches with no mention of the statute of limitations. The issue of the statute of limitations has been first raised in this Court on this appeal. On remand, the Chancellor was perfectly free to rule upon that issue as he saw fit and it is our opinion that he should have followed his inclinations and sustained the plea.

Laches is a defense peculiar to Courts of equity and the doctrine is usually applied where no statute of limitations governs the case. However, on occasions the doctrine is applied to bar a stale claim prior to the running of the statute of limitations; but it should be applied in such cases when there is gross laches in the prosecution of the claim. See Bogert on Trust, Section 169 (Hornbook series); *State Ex Rel* v. *Abernathy* (1929) 159 Tenn. 175, 17 S.W. 2d 17; *Carpenter* v. *Wright* (1929) 158 Tenn. 289, 13 S.W.2d 51.

Laches is actually based on equitable estoppel and is dependent upon the facts and the equities of each individual situation. *State Ex Rel* v. *Abernathy*, supra, and *Hamilton Nat. Bank* v. *Woods* (1948 E.S.) 34 Tenn. App. 360, 238 S.W. 2d 109. Contrarywise, there is little, if any, equity involved in a statute of limitations. Statutes of limitations are arbitrary time periods fixed by the Legislature to put at rest possible litigation after the lapse of that period fixed by the Legislature for the benefit of society in general in order to promote certainty and repose.

Long delay alone in the prosecution of a claim is insufficient for the application of the doctrine of laches. The present circumstances of the parties must be considered. There must be actual aquiescence or that implied from the circumstances of the case, in the conduct of the defendant. Whether or not such exists is dependent upon the facts. And whether the facts are sufficient is dependent upon the Court applying those facts. One Court may reach a different conclusion than another. Initially, we could find no factual condition in the record, as we reviewed it, that would put the complainant-beneficiaries on reasonable inquiry or notice of the complained of exchange which, therefore, "tolled the running" of the doctrine of laches.

However, the question of the reasonableness of the opportunity to discover is not a matter for judicial conclusions when dealing with statutes of limitations as they are statutes of repose. See and compare *West* v. *Moore* (1952) 193 Tenn. 431, 246 S.W. 2d 74; *Lee* v. *Harris* (1949) 188 Tenn. 373, 219 S.W. 2d 892. A plea of laches and a plea of the statute of limitations are not the same thing. As in this case, laches may not bar the claim; but the statute of limitations will. See and compare *In Re Estate of Darwin* (1973) 503 S.W. 2d 511.

Able counsel for the beneficiaries also argues that even if all the foregoing is true, which by no stretch of the imagination is conceded, the defendant bank as Trustee was obligated to sue itself when it received the corpus of the first trust on the death of Norman Raoul. This position is based on the theory that when the bank accepted the corpus from the old trust, it was obligated to check the manner in which it had previously handled the first trust, and if irregularities were discovered to sue the prior Trustee which happened to be itself. Since the second trust was an express trust and not terminated, the statute of limitations has not yet begun to run against the Trustee as Trustee of the second trust. We are cited to cases which involve the duties of successor trustees. However, the bank as Trustee under the second trust was not and is not a successor trustee. Any cause of action for the mismanagement of the first trust belonged to the beneficiaries thereof upon its termination and never became the right or duty of the Trustee under the second trust, which trust was not and is not the same as the first trust.

For the reasons stated, we are of the opinion that the claim of the beneficiaries is barred by the statute

of limitations and the Chancellor erred in not so holding. We do not reach the other Assignments of Error.

The result is that the suit will be dismissed.

The Court is of the opinion that in this case the costs below and costs of appeal are to be adjudged against the defendant bank.

So order.

Judge William P. Puryear, by designation of the Supreme Court of Tennessee, took part in the hearing of this appeal in the absence of Presiding Judge C. S. Carney, Jr.

/s/ Nearn, J.
Nearn, J.

/s/ Matherne, J.
Matherne, J. (Concurs)

/s/ W. P. Puryear
Puryear, Sp. J. (Concurs)

COURT OF APPEALS

DECREE

Filed August 30, 1974
John A. Parker, Clerk

Hamilton Equity (#38441)

NORMA FRANCES RAOUL CLARK, et al,

vs.

AMERICAN NATIONAL BANK & TRUST COMPANY OF CHATTANOOGA.

REVERSED & DISMISSED

This cause coming on to be heard upon a transcript of the record from the Chancery Court of Hamilton County, assignments of error, reply brief and argument of counsel, upon consideration whereof the Court is of opinion that in the decree of the Chancellor there is error.

It is therefore ordered and decreed by the Court that the decree of the Chancellor be reversed, and that this suit be dismissed.

Costs in the Chancery Court and in the Court of Appeals are adjudged against the defendant, American National Bank & Trust Company of Chattanooga, for which execution may issue if necessary.

IN THE COURT OF APPEALS OF TENNESSEE
AT JACKSON

Hamilton Equity

Norma Frances Raoul Clark, et al,
Original Appellants,

vs.

American National Bank and Trust
Company of Chattanooga,
Original Appellee.

ON PETITION TO REHEAR

(Filed November 6, 1974)

A petition to rehear, response thereto and a response to the response have all been filed in this matter.

The petition to rehear filed by counsel for complainant-appellants raises seven alleged grievances. Six of those seven were heretofore thoroughly argued and briefed by counsel and were considered by this Court in its Opinion rendered August 30, 1974. Therefore, they will not again be considered. See *Lyman* v. *American Nat. Bank and Trust Co.* (1960 E.S.) 48 Tenn. App. 328, 346 S.W. 2d 289.

However, the petition does raise the issue of the alleged improper reliance of counsel for the Bank and this Court on the statute of limitations as set out in T.C.A. § 28-309. The gist of the complaint is that by their pleadings, the Bank relied specifically on T.C.A. § 28-310 with no mention therein of the limitation as set out in T.C.A. § 28-309.

The record reveals that the pleadings of the Bank do not specifically mention T.C.A. § 28-309. The record does further show that nowhere has the Bank's right to

rely on T.C.A. § 28-309 ever been questioned until the petition to rehear was filed. The record further reveals that T.C.A. § 28-309 was the issue below and was considered by the Chancellor as he specifically mentions the six year statute of limitations in his Opinion which is part of the record. The argument below and the issue and argument on appeal was the interpretation and applicability of the limitations as set out in T.C.A. § 28-309. The Bank's inability to rely on the statute for failure to specifically plead same is an issue that has never before in this cause been raised until this time. The limitation as set out in T.C.A. § 28-309 has been at all times heretofore considered by the parties, the Chancellor, and this Court without objection by complainant-appellants. The objection comes too late.

It is a well established rule that a litigant will not be permitted to act on one theory in the Trial Court and switch to another on appeal. *Thomas* v. *Noe* (1956 E.S.) 42 Tenn. App. 234, 301 S.W. 2d 391. The rule is applied with double force when the switch takes place on a petition to rehear.

The petition is denied with costs adjudged against complainant-appellants.

Nearn, J.

Matherne, J. (Concurs)

Puryear, Sp. J. (Concurs)

IN THE TENNESSEE COURT OF APPEALS
AT KNOXVILLE

(Filed Nov. 6, 1974)
(John A. Parker, Clerk Court of Appeals)

Hamilton County Chancery Cause No. 38441

NORMA FRANCES RAOUL CLARK, et al,
Original Appellants,

vs.

AMERICAN NATIONAL BANK & TRUST
COMPANY OF CHATTANOOGA,
Original Appellee.

PETITION TO REHEAR DENIED

This cause coming on to be heard upon a petition to rehear, response thereto and a response to the response, upon consideration whereof the Court is of the opinion that the petition is not well taken and must be denied;

Therefore, it is adjudged and decreed that the petition to rehear be and hereby is denied at petitioners costs.

Said costs incidental to the petition to rehear and adjudged against the petitioners Norma Frances Raoul Clark, et al, and surety Warren K. Clark, for which let execution issue.

Nearn, J.
Matherne, J.
Puryear, J.

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE

HAMILTON EQUITY

NORMA FRANCES RAOUL CLARK and
ANNE ELIZABETH RAOUL,
Plaintiff-Petitioners,

vs.

AMERICAN NATIONAL BANK and TRUST
COMPANY OF CHATTANOOGA,
Defendant-Respondents.

ORDER DENYING PETITION FOR WRIT OF CERTIORARI

(Filed July 7, 1975)

After a consideration of the petition, briefs of counsel and the entire record, this Court is of the opinion that the Court of Appeals reached the correct conclusion.

The petition for writ of certiorari is accordingly denied.

Per Curiam

SUPREME COURT OF TENNESSEE,
AT KNOXVILLE

SEPTEMBER TERM 1974

DECREE

(Filed July 7, 1975)
(John A. Parker, Clerk)

Hamilton Equity
(No. 38441)

NORMA FRANCES RAOUL CLARK and
ANNE ELIZABETH RAOUL,

vs.

AMERICAN NATIONAL BANK and TRUST
COMPANY OF CHATTANOOGA.

WRIT DENIED

This cause coming on to be heard upon a transcript of the record from the Chancery Court of Hamilton County, opinion and Decree of the Court of Appeals, petition for certiorari, assignments of error and briefs of counsel, upon consideration whereof the Court is of opinion that the petition for writ of certiorari is not well taken, and said petition for certiorari is denied.

The petitioners, Norma Frances Raoul Clark and Anne Elizabeth Raoul, and surety, Warren K. Clark, will pay the costs incident to filing petition for certiorari, for which let execution issue.

Per Curiam

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE

HAMILTON EQUITY

NORMA FRANCES RAOUL CLARK and
ANNE ELIZABETH RAOUL,
Plaintiff-Petitioners,

vs.

AMERICAN NATIONAL BANK and TRUST
COMPANY OF CHATTANOOGA,
Defendant-Respondents.

MEMORANDUM OPINION ON PETITION TO REHEAR

(Filed August 11, 1975)

Petitioners have filed a petition to rehear.

We are asked to reconsider and recede from our prior decision to deny the writ of certiorari on two grounds which may be summarized as follows:

a. Petitioners were deprived of their constitutional right to have their petition considered by the full Court.

b. The failure to apply the rule of *Teeters* v. *Currey*, 518 S.W.2d 512 (Tenn.1975) constitutes a denial of their rights under Article 1, Sections 8 and 17 of the Constitution of Tennessee and the Fourteenth Amendment to the Constitution of the United States.

Article 6, Section 2 of the Constitution of Tennessee provides that "(t)he concurrence of three of the judges shall in every case be necessary to a decision."

Section 16-301 T.C.A. contains substantially the same provision.

In the case of *Radford Trust Company* v. *Lumber Company*, 92 Tenn. 126, 21 S.W. 329 (1893), this Court, after reciting the constitutional requirements, held:

> The same number which may render a judgment constitute a quorum of the Court.

It is settled law that the concurrence of three judges of this Court produces a valid judgment. *Pierce* v. *Tharp*, 224 Tenn. 328, 461 S.W.2d 950 (1970).

In this case three judges of this Court, following substantial consideration, unanimously determined that the writ would be denied.

We fully considered *Teeters, supra,* and concluded that it had no relevance to the issues in this controversy.

The petition to rehear is respectfully denied.

/s/ Henry
Henry, J.

Concurrences:

Fones, C. J.
Harbison, J.

Cooper, J. and
Brock, J. did not participate

SUPREME COURT OF TENNESSEE,
AT KNOXVILLE

SEPTEMBER TERM, 1974

(Filed August 11, 1975)
(John A. Parker, Clerk)

Hamilton Equity
(No. 38441)

NORMA FRANCES RAOUL CLARK and
ANNE ELIZABETH RAOUL,

vs.

AMERICAN NATIONAL BANK AND TRUST
COMPANY OF CHATTANOOGA.

DECREE

(Filed September 29, 1975)

PETITION TO REHEAR DENIED

This cause came on to be further heard on the Petition to Rehear, upon consideration whereof the Court is of the opinion the Petition to Rehear is not well taken and should be denied.

It is, therefore, ordered and decreed by the Court that the Petition to Rehear is denied.

Costs on the Petition to Rehear will be paid by petitioners, Norma Frances Raoul Clark and Anne Elizabeth Raoul, and surety, Warren K. Clark, for which let execution issue.

Joseph W. Henry, J.
William H. D. Fones, C.J.
William J. Harbison, J.